Dato' Seri Anwar bin Ibrahim v Dato' Seri Dr Mahathir bin Mohamad

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–02–663 OF 1999
AHMAD FAIRUZ, MOKHTAR SIDIN AND DENIS ONG JJCA
9 DECEMBER 2000

Civil Procedure *— Appeal — Appeal against exercise of trial judge's discretion — Role of appellate court to review only — Appellant to show that judge had erred in principle or failed consider relevant consideration or asked himself wrong questions — Whether appeal should be allowed*

The appellant had filed a defamation suit against the respondent. The respondent applied to strike out the writ of summons and the statement of claim pursuant to O 18 r 19(1)(a), (b) and (d) of the Rules of the High Court 1980 and the inherent jurisdiction of the court. The trial judge, exercising his discretionary power, allowed the respondent's application. The appellant appealed.

Held, dismissing the appeal:

(1) In appeals against exercise of discretion, the role of an appellate court is one of review only. It is for the appellant to convince the appellate court that the judge has erred in principle or has failed to take into account relevant considerations or has asked himself the wrong questions. In the present appeal, from the reasonings of the trial judge, the court was unable to see how the trial judge can be said to have erred in principle. He had taken into account relevant considerations and asked himself the right questions (see pp 308C, 309B).

(2) The court was unable to find anything in the trial judge's judgment that can indicate that he had erred in law or facts in his reasonings and conclusion on the issue of justification and qualified privilege. It was clear that the respondent was sheltered by the defences of justification and qualified privilege when he uttered the offending statement. It was very plain and obvious that the claim of the appellant was obviously unsustainable (see p 310A, C–D).

[**Bahasa Malaysia summary**

Perayu telah memfailkan suatu guaman fitnah terhadap responden. Responden memohon supaya writ saman dan pernyataan tuntutan dibatalkan menurut A 18 k 19(1)(a), (b) dan (d) Kaedah-Kaedah Mahkamah Tinggi 1980 dan bidang kuasa sedia ada mahkamah. Dalam melaksanakan kuasa beliau berdasarkan budi bicara, hakim perbicaraan membenarkan permohonan responden. Perayu telah merayu.

Diputuskan, menolak rayuan tersebut:

(1) Dalam rayuan terhadap pelaksanaan budi bicara, mahkamah rayuan hanya melaksanakan fungsi mengkaji semula sahaja. Adalah tugas perayu untuk meyakinkan mahkamah rayuan bahawa hakim terkhilaf dalam prinsip atau telah gagal mengambil kira pertimbangan yang relevan atau menimbulkan soalan-soalan yang betul. Dalam rayuan ini, daripada taakulan yang dibuat oleh hakim perbicaraan, mahkamah tidak dapat melihat bagaimana hakim perbicaraan boleh dikatakan telah terkhilaf dalam prinsip. Beliau telah mengambil kira pertimbangan yang relevan dan menimbulkan soalan-soalan yang betul (lihat ms 308C, 309B).

(2) Mahkamah tidak menjumpai apa-apa dalam penghakiman hakim perbicaraan yang dapat menunjukkan bahawa beliau telah terkhilaf dari segi undang-undang atau fakta dalam taakulan dan kesimpulan atas isu justifikasi dan perlindungan bersyarat. Adalah jelas bahawa responden dilindungi oleh pembelaan justifikasi dan perlindungan bersyarat apabila beliau mengucapkan pernyataan yang menyalahi undang-undang itu. Amat nyata sekali tuntutan perayu tidak boleh dikekalkan (lihat ms 310C–D, A).]

Notes

For cases on appeal generally, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 369–964.

Cases referred to

A-G of the Duchy of Lancaster v London & North Western Railway Co (1892) 3 Ch 274 (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corp Bhd [1993] 3 MLJ 36 (refd)

Lange v Atkinson [1988] 3 NZLR 424 (refd)

Levene v Roxhan & Ors [1970] 1 WLR 1322 (refd)

Lim Ah Moi v AMS Periasamy Suppiah Pillay [1997] 3 MLJ 323 (refd)

Marchioness of Huntly v Gaskell [1905] 2 Ch D 656 (refd)

Paya Terubong Estates Sdn Bhd v Pusaka Warisan Sdn Bhd [1998] 2 MLJ 463 (refd)

Tan Ah Poi, Re; ex p Multi-Purpose Finance Bhd [1999] 2 MLJ 555 (refd)

Legislation referred to

Rules of the High Court 1980 O 18 r 19(1)(a), (b), (d)

Appeal from: Civil Suit No S2–23–07–99 (High Court, Kuala Lumpur)

Karpal Singh (*Gobind Singh Deo* with him) (*Karpal Singh & Co*) for the appellant.

Adnan Shuaib (*N Chandran* with him) (*Adnan Sundra & Low*) for the respondent.

Ahmad Fairuz JCA. (delivering judgment of the court): The appellant filed a defamation suit against the respondent in the High Court of Malaya at Kuala Lumpur. The amended statement of claim of the appellant alleged that the respondent had, on 22 September 1998, uttered the following words ('the offending words'):

> I had disbelieved the homosexuality charges at first but was convinced when I personally interviewed Anwar's partner.
>
> They had not only performed sodomy, but during the process, he was … I don't know how you call it … he was masturbating this man.
>
> Do I go around town and tell the world that this is what my deputy was doing?

It was alleged by the appellant that the respondent spoke and published the offending words to a crowd of journalists from both the national and international media. The appellant contended that the offending words were defamatory of him. As such the appellant prayed for:

(1) damages amounting to RM100m with interests;

(2) an injunction restraining the defendant by himself or by his servants or agents from farther uttering the offending words or words to the like effect of or concerning the plaintiff; and

(3) any other relief the court found just and proper.

In his defence, the respondent admitted holding a press conference on 22 September 1998. In attendance at the conference were national and foreign journalists. To a question by a journalist as to why the appellant had been dismissed as Deputy Prime Minister, Minister of Finance and Deputy President of UMNO, the respondent stated the following:

> It is difficult for me to explain and I think it will be difficult for them to explain. I'll tell you what the police tells me … . (Dr Munawar) Anwar … Anees told them. They had not only performed sodomy but during the process he was doing … he was … I don't know what you call it, he was masturbating this man. This is what … do I go around the town and tell the world that this is what my deputy was doing? And yet he did it. I mean, I cannot understand how a man would invent a story like that but this is what he told me, he told the police. He didn't tell me, he told the police. Their behaviour was despicable. And this is a man who talks about other people being despicable. His behaviour was despicable ('the statement').

The statement was, according to the respondent, based on matters that were already of public knowledge and on information related to him by the police. The respondent contended that the statement is true in fact and in substance. He also relied on the defence of qualified privilege.

On 24 May 1999, the respondent applied to strike out the indorsement in the amended writ of summons and the amended statement of claim pursuant to O 18 r 19(1)(a), (b) and (d) of the Rules of the High Court 1980 ('the RHC'), and the inherent jurisdiction of the Court. After considering the affidavits filed by both parties and the submissions made by counsel, the learned trial judge allowed the respondent's application.

Before us counsel, for both parties agreed that the learned High Court judge was exercising a discretionary power when allowing the respondent's application. Hence, both counsels referred us to the case of *Paya Terubong Estates Sdn Bhd v Pusaka Warisan Sdn Bhd* [1998] 2 MLJ 463 whilst the learned respondent's counsel also referred us to the case of *Lim Ah Moi v AMS Periasamy Suppiah Pillay* [1997] 3 MLJ 323. It is clear from these authorities that in appeals against exercises of discretion, the role of an appellate court is one of review only. It is for the appellant to convince the appellate court that the learned judge has erred in principle or has failed to take into account relevant considerations or has asked himself the wrong questions. If the appellant succeeds in discharging that burden, the appellate court will then intervene and set matters right by exercising its own discretion.

It was argued by the appellant that the learned trial judge was wrong when he based his finding that there was justification on third parties' admissions or pleas of guilt. Such convictions can only be conclusive as against the third party itself, that is to say, as against Munawar and Sukma, and cannot be extended to the appellant. It was also pointed out that the respondent was relying on what was told to him by the police when he uttered the offending words or the statement. This was obviously hearsay evidence. And the learned trial judge fell into error when he took this into consideration.

The learned respondent's counsel submitted that the convictions formed part of the respondent's defence. The convictions in fact, according to counsel, show that the appellant had committed the acts of gross indecency as spoken of in the offending words of the statement. Thus, the offending words or the statement is, according to counsel, true in substance and in fact. Accordingly, argued the respondent's counsel, the defence of justification is clearly available to the respondent. It was also contended by counsel that the respondent's words, when tested against the facts surrounding the convictions, would render the appellant's claim 'obviously unsustainable' and consequently the respondent's application should be allowed.

In his grounds of judgment, the learned trial judge referred to the convictions of Munawar and Sukma. He referred in particular to the facts read out in the sessions court in respect of both the cases. He also referred to the parts of the affidavits which disclosed that the respondent had received information from the police about the appellant's homosexual activities as early as in 1993, and the appellant's homosexual relationships with Munawar and Sukma. These facts, according to the learned trial judge, point directly to the involvement of the appellant as stated in the offending

words. Hence, he found that the respondent's words were true in substance and in fact. Consequently, the learned trial judge concluded that the defence of justification was available to the respondent and on that ground alone the appellant's statement of claim ought to be struck out.

From the reasonings of the learned trial judge as summarized in para 7 above, we are unable to see how the learned trial judge can be said to have erred in principle. We find that he had indeed taken into account relevant considerations — including the matter of the two convictions and the facts as related to the sessions courts. We also find nothing in his judgment that can indicate that he had asked himself the wrong questions. We also agree with the learned respondent's counsel that on the authorities of *Marchioness of Huntly v Gaskell* [1905] 2 Ch D 656 at p 667 and *Re Tan Ah Poi; ex p Multi-Purpose Finance Bhd* [1999] 2 MLJ 555 at p 561, the convictions of Munawar and Sukma are conclusive and final.

It was argued by the learned appellant's counsel that the admitted facts in Munawar's and Sukma's cases do not justify the use of the word 'masturbation'. On this issue, we agree with the learned respondent's counsel's contention that s 8 of the Defamation Act 1957 would have covered the situation. Section 8 reads:

> In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges.

As to the issue of qualified privilege, it was the submission of the appellant's counsel that the learned trial judge had not considered the appellant's reply to the statement of defence, as found in p 89 of the appeal record ('AR'). It was contended that the judge did not consider the issue of malice as raised in that reply.

The learned respondent's counsel drew our attention to the fact of incessant attacks by the appellant of the respondent, UMNO, the government, the police force and the Attorney General. These attacks, according to the respondent, were given wide publicity. As such, the learned counsel urged us to hold that, in the circumstances, the respondent rightly perceived a right to reply to those attacks. It was also submitted by the respondent's counsel that there were fervent calls made on the respondent to explain the appellant's removal from his cabinet and party positions. It was also contended by counsel that the removal of the appellant from his cabinet and party positions were matters of public interest and consequently it was the respondent's duty to explain the said removals to the nation. Under the aforementioned circumstances, it was contended by the respondent's counsel, that there can be no place for malice in the matter.

In his judgment, the learned trial judge, in our view, rightly referred to para 14.49 in *Gatley on Libel & Slander* (9th Ed) for guidance. He then set out in his judgment the relevant facts that led him to conclude that the statement or the offending words were spoken by the respondent 'on an

occasion of qualified privilege'. We had carefully perused the learned judge's judgment on this issue and we are unable to find anything in his judgment that can indicate that he had erred in law or facts in his reasonings and conclusion on that issue. And at p 126 AR, the learned judge had indeed considered the issue of malice. He had set out his reasons for concluding that the respondent's mind was 'devoid of malice' when he uttered the statement/the offending words. We are also unable to disagree with his reasonings and conclusion on this 'malice' issue. Further, in the light of the case of *Lange v Atkinson* [1988] 3 NZLR 424 which held that 'the defence of qualified privilege applied to generally published statements made about the actions and qualities of those currently or formerly elected to Parliament … so far as those actions and qualities directly affected their capacity (including their personal ability and willingness) to meet their public responsibilities', we are of the view that the decision of the learned trial judge on the issue of qualified privilege should not be disturbed.

On the premise of the abovementioned paragraphs, it is clear that the respondent was sheltered by the defences of justification and qualified privilege when he uttered the offending words or the statement. It is very plain and obvious that the claim of the appellant is obviously unsustainable (*A-G of the Duchy of Lancaster v London & North Western Railway Co* (1892) 3 Ch 274 referred to in the Supreme Court case of *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1993] 3 MLJ 36).

At this stage, it may be pertinent to note the following words of Salmon LJ in *Levene v Roxhan & Ors* [1970] 1 WLR 1322 at p 1324:

> In the circumstances … , it would have been apparent that the defence was bound to succeed. To have persisted with the action would clearly have been an abuse of the process of the court … Indeed, if, … , a judge were to exercise his discretion by refusing to strike out the statement of claim, this court would have no hesitation in coming to the conclusion that that was a wholly wrong exercise of discretion and would order the statement of claim to be struck out.

We would, in the circumstances and facts of this appeal, adopt and apply Salmon LJ's aforequoted words. Consequently, we dismiss with costs the appellant's appeal and confirm the learned trial judge's order to strike out the appellant's suit with costs.

Appeal dismissed.

Reported by Jafisah Jaafar